IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-728

MENTAL PATIENT CIVIL LIBERTIES PROJECT, DAVID FERLEGER, DALLAS ATKINS, EDDIE BACHUS, BONNIE GOLDBERG, ALEXANDER EWING, PATIENTS' RIGHTS ORGANIZATION, LARRY BROWN, JEAN WEAVER, DONNA HOLLOMAN, STEVEN MELKO, WILLIAM TRAUGER, TIMOTHY BAER, Individually and on Behalf of the Classes They Represent,

Petitioners,

v.

DEPARTMENT OF PUBLIC WELFARE, HAVERFORD STATE HOSPITAL, HOSPITAL STAFF CIVIL RIGHTS COMMITTEE, HELENE WOHLGEMUTH, WILLIAM B. BEACH, JR., JACK B. KREMENS, AARON SMITH, F. LEWIS BARTLETT, EDDIE MAE BERRIEN, KATHLEEN (HALBERSTADT) CULP, ALBERT DIDARIO, JOHN FONG, GRACE HARRISON, CECIL MAIDMAN, Individually and in Their Official Capacities.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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MENTAL PATIENT CIVIL LIBERTIES PROJECT, DAVID FERLEGER, DALLAS ATKINS, EDDIE BACHUS, BONNIE GOLDBERG, ALEXANDER EWING, PATIENTS' RIGHTS ORGANIZATION, LARRY BROWN, JEAN WEAVER, DONNA HOLLOMAN, STEVEN MELKO, WILLIAM TRAUGER, TIMOTHY BAER, INDIVIDUALLY AND ON BEHALF OF THE CLASSES THEY REPRESENT,

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———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioners Mental Patient Civil Liberties Project, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on August

4, 1976, petition for rehearing en banc and to amend judgment denied, August 30, 1976.

OPINION BELOW.

The judgment order of the Court of Appeals, not yet reported, appears in the Appendix hereto, p. A1, and the order denying rehearing, not yet reported, appears at p. A3. The order of the District Court for the Eastern District of Pennsylvania which summarily denied Plaintiffs' Motion for Counsel Fees, and the Memorandum and Order Denying Plaintiffs' Motion for Reconsideration, both of which are not reported, appear in the Appendix, pp. A5 and A7.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on August 4, 1976 and appears in the Appendix hereto, p. A1. The order denying rehearing was entered August 30, 1976 and appears in the Appendix hereto, p. A3. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Civil Rights Attorneys' Fees Award Act of 1976, P. L. 94-559, 42 U. S. C. § 1988 as amended (October 19, 1976) applies to a pending action commenced under 42 U. S. C. §§ 1983, 1985 and 1988 to establish important civil rights of mental patients in which plaintiffs were successful but were denied an award of counsel fees based on the ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975) which denial was summarily affirmed by the Third Circuit Court of Appeals.

STATUTORY PROVISION INVOLVED.

The Civil Rights Attorney's Fees Awards Act of 1976. Public Law 94-559, approved October 19, 1976:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as 'The Civil Rights Attorney's Fees Award Act of 1976'".
>
> "Sec. 2. That the Revised Statutes section 722 (42 U. S. C. 1988) is amended by adding the following: 'In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.'"

STATEMENT OF THE CASE.

This class complaint was commenced in order to assure that fundamental constitutional rights of present and future patients at Haverford State Hospital would be vindicated. Its successful conclusion for the benefit of the class members has established precedent of import in the field of rights for mental patients nationwide.

On July 5, 1973, this class action litigation was filed by Plaintiff Mental Patient Civil Liberties Project, Patients Rights Organization, individual patients, and ex-patients seeking to enjoin defendants' unlawful and arbitrary practices and policies to restrict community organizers, citizens, attorneys and those working in conjunction with them from visiting, talking with, providing services to, and advocating for the federal and state rights of residents of mental hospitals. Plaintiffs charged that these policies and practices abridge the rights of patients and those who seek to serve them, as guaranteed under the First, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States, and under 42 U.S.C. §§ 1983, 1985 and 1988. Plaintiffs further sought enforcement of contractual rights which provided access to the mental hospital, and an award of damages and reasonable attorneys' fees.

On July 18, 1973, Plaintiffs' Motion for a Preliminary Injunction was determined after hearing. In denying the preliminary injunction, the court stressed that the irreparable harm alleged did not outweigh the effect of an injunction on the defendants who also filed a Motion to Dismiss that was not yet disposed of. Though Plaintiffs were unsuccessful in securing a premiminary injunction, the Consent Decree entered in this case embodies substantially the relief sought at the preliminary injunction hearing.

This action was certified as a class action under Federal Rule of Civil Procedure 23(b)(2), Order of July 15, 1974, on behalf of all persons living at Haverford State Hospital ["patients class"] as well as on behalf of four other classes of persons and groups seeking to assist these patients.

On April 14, 1975, as a result of long persistence, fruitful discovery and other vigorous litigation effort in spite of ongoing resistance by defendants, a Consent Decree was entered into by Plaintiffs and defendants. The Consent Decree provided generally for the protection of First Amendment and other Constitutional rights of mental patients at Haverford State Hospital. In signing the Consent Decree, class counsel expressly reserved the right to seek attorneys' fees by cover letter to the court, and thereafter filed a Motion for an Award of Counsel Fees and Costs based on the benefits conferred on the class members, or alternatively because of the bad faith of the defendants.

On June 26, 1975, Plaintiffs' Motion for Counsel Fees and Costs was denied summarily by Judge Newcomer. Plaintiff filed a Motion for Reconsideration which was denied by the Court on August 15, 1975 on the grounds that the recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 412 U. S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975) does not allow an award of attorney's fees for cases involving nonmonetary benefits conferred on a class, and in any event, there was no way in which the burden of attorneys' fees awarded could be shifted to those who stand to benefit from this case (App. p. A5). The Court of Appeals for the Third Circuit summarily affirmed on August 4, 1976 (App. p. A1), and denied rehearing en banc on August 30, 1976 (App. p. A3).

REASONS FOR GRANTING THE WRIT.

This case presents an important question concerning fee awards in public interest litigation, which has not, and should be, resolved by this Court. Whether the recently enacted Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, approved October 19, 1976, applies to authorize the award of attorneys' fees in civil rights action pending [1] at the time this new law was enacted, is expressly answered in the affirmative in the legislative history of this Act, but should be judicially determined definitively, to resolve this issue for numerous other cases in a similar posture as this one.

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 stresses the need to expressly authorize awards of attorneys' fees in civil rights litigation. In the Report of the Senate Committee on the Judiciary, Senate Report No. 94-1011, 94th Congress, 2nd Session, June 29, 1976 (to accompany S 2278) the Judiciary Committee states:

> "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

1. While this case has been resolved at the circuit court level, its pendency continues until appellate proceedings at the U. S. Supreme Court level are exhausted, or until the time for filing for such review at the Supreme Court level has expired. *Bradley v. School Board of City of Richmond*, 416 U. S. 696, 711 n. 14, 94 S. Ct. 2006, 2016 n. 14, 40 L. Ed. 2d 476 (1974).

Congress recognized this need when it made specific provisions for such fee shifting in Title II and VII of the Civil Rights Act of 1964:

> 'When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees— ° ° ° to encourage individuals injured for racial discrimination to seek judicial relief under Title II. *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968).'

The idea of the 'private attorney general' is not a new one, nor are attorneys' fees a new remedy. Congress has commonly authorized attorneys' fees in laws under which 'private attorneys general' play a significant role in enforcing our policies. . . . In cases under these laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies. As former Justice Tom Clark found, in a union democracy suit under the Labor-Management Reporting and Disclosure Act (Landrum-Griffin),

> 'Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. ° ° ° Without counsel fees the grant of Federal jurisdiction is but an empty gesture ° ° ° . Hall v. Cole,

412 U. S. 1 (1973), quoting 462 F. 2d 777, 780-81 (2d Cir. 1972).'"

[Senate Report at 2-3]

Futher stressing the need for such fee awards in these cases, the Judiciary Committee Report, at 4 states:

> "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968)."

With reference to the applicability of this new Act to pending actions, Congress expressly stated in the Report of the House of Representatives, Committee on the Judiciary, H. R. Rep. No. 94-1588, 94th Congress, 2nd Session, September 15, 1976 (to accompany H. R. 15460), at 4, n. 6:

> "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley v. Richmond School Board*, 416 U. S. 696 (1974)."

In *Bradley*, the precise issue of the applicability of a fee awards statute enacted during the pendency of an appeal, was determined in favor of the applicability of such statute. Petitioners submit that *Bradley* is controlling here. Accordingly, petitioners urge, as in *Bradley*, that the judgment of the Court of Appeals be vacated and the case remanded with directions to apply the Civil Rights Attorney's Fees Awards Act of 1976.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

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Counsel for Petitioners.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 75-2210.

MENTAL PATIENT CIVIL LIBERTIES PROJECT, DAVID FERLEGER, DALLAS ATKINS, EDDIE BACHUS, BONNIE GOLDBERG, ALEXANDER EWING, PATIENTS' RIGHTS ORGANIZATION, LARRY BROWN, JEAN WEAVER, DONNA HOLLOMAN, STEVEN MELKO, WILLIAM TRAUGER, TIMOTHY BAER, individually and on behalf of the classes they represent,

Appellants,

v.

DEPARTMENT OF PUBLIC WELFARE, HAVERFORD STATE HOSPITAL, HOSPITAL STAFF CIVIL RIGHTS COMMITTEE, HELENE WOHLGEMUTH, WILLIAM B. BEACH, JR., JACK B. KREMENS, AARON SMITH, F. LEWIS BARTLETT, EDDIE MAE BERRIEN, KATHLEEN (HALBERSTADT) CULP, ALBERT DIDARIO, JOHN FONG, GRACE HARRISON, CECIL MAIDMAN, individually and in their official capacities.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Civil No. 73-1512)

Submitted Under Third Circuit Rule 12(6), April 20, 1976
Before: ALDISERT, HASTIE and WEIS, *Circuit Judges*
Resubmitted Under Third Circuit Rule 12(6),
August 3, 1976
Before: ALDISERT, HUNTER and WEIS, *Circuit Judges*

JUDGMENT ORDER.

After consideration of all contentions raised by appellants, and for the reasons set forth in the district court MEMORANDUM AND ORDER by The Honorable Clarence C. Newcomer, Civil No. 73-1512 (E. D. Pa., filed Aug. 18, 1975), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By THE COURT,

ALDISERT,
Circuit Judge.

Attest:
M. ELIZABETH FERGUSON,
Chief Deputy Clerk.

DATED: August 4, 1976

Certified as a true copy and issued in lieu of a formal mandate on September 7, 1976.

Test: THOMAS F. QUINN,
Clerk, United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 75-2210.

MENTAL PATIENT CIVIL LIBERTIES PROJECT, DAVID FERLEGER, DALLAS ATKINS, EDDIE BACHUS, BONNIE GOLDBERG, ALEXANDER EWING, PATIENTS' RIGHTS ORGANIZATION, LARRY BROWN, JEAN WEAVER, DONNA HOLLOMAN, STEVEN MELKO, WILLIAM TRAUGER, TIMOTHY BAER, individually and on behalf of the classes they represent,

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v.

DEPARTMENT OF PUBLIC WELFARE, HAVERFORD STATE HOSPITAL, HOSPITAL STAFF CIVIL RIGHTS COMMITTEE, HELENE WOHLGEMUTH, WILLIAM B. BEACH, JR., JACK B. KREMENS, AARON SMITH, F. LEWIS BARTLETT, EDDIE MAE BERRIEN, KATHLEEN (HALBERSTADT) CULP, ALBERT DIDARIO, JOHN FONG, GRACE HARRISON, CECIL MAIDMAN, individually and in their official capacities.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

The motion to amend judgment as to costs is denied.

By THE COURT,

ALDISERT,
Judge.

Dated: August 30, 1976.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

—

Civil Action No. 73-1512.

—

MENTAL PATIENT CIVIL LIBERTIES PROJECT, et al.

v.

DEPARTMENT OF PUBLIC WELFARE, et al.

———

ORDER.

AND NOW, to wit, this 26th day of June, 1975, the motion of plaintiff's class counsel for an award of counsel fees and costs is hereby DENIED. Accordingly, the motion of defendants to dismiss plaintiff's motion for counsel fees is GRANTED.

AND IT IS SO ORDERED.

CLARENCE C. NEWCOMER.
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

—

Civil Action No. 73-1512.

—

MENTAL PATIENT CIVIL LIBERTIES PROJECT, et al.

v.

HOSPITAL STAFF CIVIL RIGHTS COMMITTEE, et al.

———

ORDER.

AND NOW, to wit, this 15th day of August, 1975, it is hereby Ordered that plaintiffs' motion for reconsideration of our denial of plaintiffs' request for attorneys' fees is DENIED.

AND IT IS SO ORDERED.

CLARENCE C. NEWCOMER.
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

—

Civil Action No. 73-1512.

—

MENTAL PATIENTS CIVIL LIBERTIES, PROJECT, et al.

v.

HOSPITAL STAFF CIVIL RIGHTS COMMITTEE, et al.

———

MEMORANDUM AND ORDER.

NEWCOMER, *J.* August 15, 1975.

We have before us plaintiffs' motion for reconsideration of their earlier motion requesting an award of legal fees. For the reasons set forth below, plaintiffs' motion for reconsideration is denied.

Plaintiffs commenced this class action on July 5, 1973, with the purpose of securing what they alleged to be fundamental constitutional rights of present and future patients at Haverford State Hospital, as well as securing the enforcement of certain contractual rights.

On April 14, 1975, plaintiffs and defendants entered into a consent decree, which this Court approved.

Plaintiffs thereupon filed their motion for an award of attorneys' fees. We denied that request then, and believe we must adhere to that decision. In our view, such decision on our part is compelled by the Supreme Court's

recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 43 United States Law Week 4561 (May 12, 1975).

In *Alyeska,* the Court reversed an award of attorneys' fees made by the Court of Appeals for the District of Columbia Circuit to plaintiffs to a case in which plaintiffs had challenged the issuance of permits by the Secretary of the Interior for construction of the trans-Alaska oil pipeline. The Court held that absent a statutory provision for an award of attorneys' fees in a particular case, or an enforceable contract which would allow such an award, litigants in American courts must pay their own attorneys' fees. By itself, this holding would clearly preclude an award of attorneys' fees in the instant case.

Plaintiffs here, however, seek their award of attorneys fees under an exception which the *Alyeska* opinion recognizes to the rule it otherwise sets forth.[1] Under that exception;

> ". . . a party preserving or recovering a fund for the benefit of others in addition to himself, (may) recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit." 43 L. W. at 4567.

With due respect to plaintiffs' argument, the above passage from *Alyeska* does not allow an award of attorneys' fees in the instant case. The above passage speaks in terms of a party's securing for others a benefit in the form of a fund or property, rather than a benefit of a constitutional, non-economic type such as plaintiffs have secured in this case.

1. Plaintiffs also allege bad faith as another possible basis for an award of attorneys' fees in this case, but we find in this case no display of bad faith by defense counsel sufficient to warrant an award of attorneys' fees against defendant.

Plaintiffs contend the above passage applies where plaintiffs have secured non-monetary or non-economic benefits, but we can not agree. We think that further language in *Alyeska* clearly shows that the Court did not view the "common fund" exception as including a case securing a benefit of the type the instant case involves. We refer to the *Alyeska* Court's disapproval of Mr. Justice Marshall's suggestion, in his dissenting opinion, that in cases where a party secures the enforcement of statutes embodying important public policy, attorneys' fees should be awarded to the plaintiffs when the burden of the award can be shifted to those who benefit from such enforcement. In the course of disapproving such proposition, the Court expressly noted that Mr. Justice Marshall's proposition would be in effect "an *expanded* version of the common-fund approach to the awarding of attorneys' fees." 43 L. W. at 4569, nt. 39 (emphasis added). This language of the Court suggests that the Court did not believe the "common fund" exception, as the Court viewed it, applied to cases where the benefit secured was solely the enforcement of important public policy. We see no reason to persuade us the Court would hold a different view where the benefit secured was, assuming arguendo plaintiffs' contention to be correct, the observance of constitutional rights. Whatever the differences may be between statutory public policy and constitutional rights, we see no reason to differentiate between them with respect to the Court's view of the common fund exception.

We need not belabor the above point, however, for even if the common fund exception would, after *Alyeska,* extend to cases securing other than economic or proprietary benefits, such extension would apply only where the burden of the award of attorneys' fees could be shifted to the persons who will enjoy the benefit plaintiffs have secured. In *Alyeska,* as noted above, the Court in setting

forth the common fund exception said it applied where the plaintiffs could recover their attorneys' fees "from the fund or property itself, *or directly from the other parties enjoying the benefit.*" 43 L. W. at 4567 (emphasis added).

At a further point in the opinion, the Court reiterated this position where it said:

> "In this Court's common fund and common benefit decisions, the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting." 43 L. W. 4569, nt. 39.[2]

In the instant case, we can see no way, nor have plaintiffs suggested any, in which the burden of attorney's fees we might award could be shifted to those who stand to benefit from this case. As plaintiffs themselves state, such potential beneficiaries include at least all present and future inmates at Haverford State Hospital. Absent some special charge to all such present and future inmates of the hospital to reimburse the state for the attorneys' fees we would order it to pay, we see no way in which a shift of the burden of the attorneys' fees could be made with the exactitude *Alyeska* suggests is necessary. No one has proposed such a charge, nor would we expect such a proposal.

To the extent the potential beneficiaries of the instant case include the general public, the common fund concept does not apply. Cf. *Alyeska,* 43 L. W. 4569, nt. 39, where the Court expressly said that the common fund

2. Plaintiffs themselves recognize such position in their brief, where they state at page 2: "well settled law holds that one who confers a benefit (whether monetary or nonmonetary) on an ascertainable class of beneficiaries is entitled to recover attorneys' fees *from those benefitted.*" (emphasis added).

exception applies only where the burden of an award of attorneys' fees can be shifted to selected elements of the public rather than the public in general.

Accordingly, for the above reasons, an Order denying plaintiffs' motion for reconsideration on the issue of attorneys' fees shall today be entered.

CLARENCE C. NEWCOMER.
Clarence C. Newcomer, *J.*

In the Supreme Court of the United States

October Term, 1976
No. 76-728

MENTAL PATIENT CIVIL LIBERTIES PROJECT, DAVID FERLEGER, DALLAS ATKINS, EDDIE BACHUS, BONNIE GOLDBERG, ALEXANDER EWING, PATIENTS' RIGHTS ORGANIZATION, LARRY BROWN, JEAN WEAVER, DONNA HOLLOMAN, STEVEN MELKO, WILLIAM TRAUGER, TIMOTHY BAER, Individually and on Behalf of the Classes They Represent,

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Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

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JEFFREY COOPER
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October Term, 1976
No. 76-728

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment order of the Court of Appeals for the Third Circuit is reported at 541 F. 2d 275 (3d Cir. 1976). The order of the Court of Appeals denying rehearing en banc was entered August 30, 1976 and is not reported (App. to Petition at A3). The order of the District Court for the Eastern District of Pennsylvania summarily denying plaintiffs' motion for counsel fees and the memorandum order denying plaintiffs' motion for reconsideration, both of which are not reported, appear in the Appendix to Petition, at A5 and A7.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATUTORY PROVISION INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, approved October 19, 1976, provides:

> "Be it enacted by the Senate House of Representatives of the United States of America in Congress assembled, That this Act may be cited as 'The Civil Rights Attorney's Fees Awards Act of 1976'."
>
> "Sec. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: 'In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.' "

QUESTIONS PRESENTED

1. Whether this case is a pending case within the meaning of *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), for the purpose of applying the Civil Rights Attorney's Fees Awards Act of 1976, where direct review has been completed and certiorari has not been granted.

2. Whether the Eleventh Amendment bars the application of the Civil Rights Attorney's Fees Awards Act of 1976 against a State where said Act has not amended applicable civil rights statutes to subject the State itself to assessment of nonprospective monetary relief.

COUNTER-STATEMENT OF THE CASE

Commencing in May 1972, the Mental Patient Civil Liberties Project (Project) sought and received permission to conduct a program of legal services for patients residing at Haverford State Hospital. The Project and the Commonwealth subsequently entered into a formal memorandum of agreement, detailing the rights and obligations of each party during the period in which the Project continued to provide its services to Hospital patients. Because of the inability of the Project to conform its activities to necessary Hospital procedure, the Hospital Director on June 21, 1973 imposed certain restrictions on the Project which he deemed necessary to preserve the efficient functioning of the Hospital, maintain the civil rights of patients, and protect the employees of the hospital from unnecessary interference in their work. Shortly thereafter, in a letter dated June 27, 1973, Hospital Director Kremens terminated the Hospital's agreement with the Project effective September 4, 1973, the anniversary date of the agreement, in accordance with the terms of that agreement.

Following receipt of the termination letter, the Project, in conjunction with members of its staff, the Patients' Rights Organization, and present and former individual patients, filed a civil rights action seeking injunctive and declaratory relief, and damages. Plaintiffs alleged violations of the First, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States, and the

Civil Rights Act of 1871, 42 U.S.C. §§1983, 1985 and 1988. In addition, plaintiffs alleged violations of the memorandum of agreement between the Project and the Hospital, although said allegations were withdrawn upon the termination of the agreement.

On July 18, 1973, plaintiffs' motion for preliminary injunction was denied after a hearing. Subsequently, the court also denied defendants' motion to dismiss, and on July 15, 1974, certified the action as a class action under Federal Rules of Civil Procedure 23(b)(2), identifying several classes of persons and groups seeking to assist patients at Haverford State Hospital.

On April 20, 1974, the Pennsylvania Department of Public Welfare published in the Pennsylvania Bulletin a proposed mental patients' bill of rights, intended to formalize and clarify the rights of patients residing in Commonwealth mental health and mental retardation facilities. The proposal marked the commencement of formal implementation of ongoing Department efforts to define the rights of patients at such institutions.

Inasmuch as formal adoption of the proposed bill of rights would have effectively mooted plaintiffs' suit, all parties and the court below agreed to await publication of the final document. However, the Department was unable to resolve various difficulties perceived in the implementation of the regulations as proposed, and therefore declined to promulgate the bill of rights until a thorough review of its provisions was completed. Plaintiffs and defendants accordingly entered into the consent de-

cree of April 14, 1975 incorporating various provisions of the proposed bill of rights. [1]

Despite plaintiffs' agreement in the consent decree to bear their own costs, and without having notified defendants prior to signing the decree of their intention to reserve the right to petition for attorney's fees, plaintiffs filed a motion for counsel fees and costs which was denied by the Honorable Clarence C. Newcomer on June 26, 1975. Plaintiffs' motion for reconsideration was also denied by Judge Newcomer on August 15, 1975. The Court of Appeals for the Third Circuit summarily affirmed the District Court's denial of attorney's fees on August 4, 1976, and denied rehearing en banc on August 30, 1976.

Thereafter, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, which was approved on October 19, 1976. [2] On November 24, 1976, petitioners filed this petition for a writ of certiorari, relying solely upon the intervening enactment of the Attorney's Fees Act as the basis for review of the order below.

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[1] It is noteworthy that, although petitioners proclaim to have established an important precedent in the field of rights for mental patients (Petition, at 4), the Consent Decree contained no finding that respondents had violated any constitutional or civil right of any of petitioners.

[2] Pub. L. 94-559, 42 U.S.C. §1988 as amended (hereinafter Attorney's Fees Act).

ARGUMENT

I. This Is Not a Pending Case Within the Meaning of the Legislative History of the Civil Rights Attorney's Fees Awards Act of 1976

Petitioners invoke the legislative history of the Attorney's Fees Act in support of their contention that Congress intended that the Act should apply to pending civil rights actions, including cases such as the instant action, as well as to cases brought after the Act's effective date. *See*, Report of the Committee on the Judiciary of the House of Representatives, Report No. 94-1558 (to accompany H.R. 15460) at 4, n. 6 and Report of the Committee on the Judiciary of the Senate, Report No. 94-1011 (to accompany S. 2278) at 5. Like the authors of the Senate and House Reports, petitioners cite *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), as the sole precedent for the proposition that the Act shall apply to pending cases. Petition at 6, n. 1. However, on October 19, 1976, when the Attorney's Fees Act was approved, the instant case was no longer "pending" as that term was used in *Bradley, supra*, inasmuch as the Circuit Court below had already issued a final ruling upon the question of petitioners' entitlement to an award of attorney's fees under the currently prevailing precedent.

This Court in *Bradley* predicated its decision upon "the principle that a court is to apply the law in effect

at the time it renders its decision", 416 U.S. at 711, and held that new legislation applies to cases on direct appellate review at the time such new legislation becomes effective. In *Bradley,* application of this principle meant that the Court of Appeals in that case should have applied new legislation authorizing an award of attorney's fees in school desegregation cases while the appeal was *sub judice.* Unlike the circumstances in *Bradley,* in the present case direct review was exhausted by the summary affirmance of the District Court's order by the Court of Appeals on August 4, 1976 and its denial of rehearing on August 30, 1976, prior to the approval of the new Act. The holding in *Bradley* is therefore not applicable to this case in which direct review is no longer available.[8]

In virtually every case in which this Court has applied new, post- judgment legislation or regulations to reconsider an order of a lower court, the jurisdiction of this Court was premised on direct appellate review and not a discretionary grant of certiorari. *See e.g., Fusari v. Steinberg,* 419 U.S. 379 (1975); *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.,* 404 U.S. 412 (1972); *Sanks v. Georgia,* 401 U.S. 144 (1971); *Hall v. Beals,* 396 U.S. 45 (1969); *Hines v. Davidowitz,* 312 U.S. 52 (1941); *Ziffrin, Inc. v. United States,* 318 U.S. 73 (1943).

The distinction between this case, in which direct review has been completed, and a case such as *Bradley* still on direct review is not an idle one. Direct review places the "whole case" before this Court as of right,

[8] The Court in *Bradley, supra* at 711, clearly stated: "We are concerned here only with direct review."

whereby subsequent statutory enactments may be deemed to require reexamination of the statutory issues below. *Fusari v. Steinberg, supra,* at 387, n. 13. Conversely, review on certiorari is discretionary and is undertaken, *inter alia,* as "an exercise of this court's power of supervision". Rules of the Supreme Court of the United States, Rule 19. In the present case, the courts below properly ruled on the attorney's fees issue under the law applicable at the time, and no question has been raised in the Petition as to the propriety of the rulings below.

In *Thorpe v. Housing Authority of City of Durham,* 386 U.S. 670 (1967), this Court vacated and remanded a case to a state supreme court on the basis of a newly-announced federal policy guideline issued *after* certiorari has been granted. The Court had already determined that certiorari should issue to review the judgment of the lower court when the subsequent policy guideline obviated the need to review the then-existing record. In this case, the petition for a wirt of certiorari was not even filed when the Attorney's Fees Act was approved. Petitioners have advanced no independent reason to review on certiorari the orders of the courts below. Moreover, the subsequent statutory change here at issue in no way affects the status of petitioners' substantive rights as they were considered by the courts below. *See also, United States v. Alabama,* 362 U.S. 602 (1960).

The decisions of this Court thus allow reference to newly-enacted law only when a case is on direct review before either a Circuit Court or this Court or when certiorari already has been granted and a change in the law makes consideration of the issues presented on certiorari

inappropriate. This case satisfies neither condition. The District and Circuit Courts properly applied the then-existing law in reaching the judgment that attorney's fees could not be awarded in this case. No right of direct review exists. And no substantive basis exists for reviewing the record below on certiorari. Unlike *Stanton v. Bond,* —— U.S. ——, 97 S.Ct. 479 (1976), where certiorari had been granted prior to the effective date of the Attorney's Fees Act, here no issue is presented or exists which is otherwise appropriate for review but subsequently affected by that Act.

Therefore, the petition for a writ of certiorari should be denied because this case was no longer pending when the Attorney's Fees Act took effect.

II. The Eleventh Amendment to the United States Constitution Bars the Application of the Civil Rights Attorney's Fees Awards Act to the States

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Petitioners primarily brought this action below pursuant to 42 U.S.C. §1983, alleging the deprivation of constitutional rights secured thereby.[4] The settled and unassailable interpretation of Section 1983 is that neither a state nor any of its agencies is a "person" within the meaning of that provision. *Edelman v. Jordan*, 415 U.S. 651 (1974); *U.S. ex rel. Gittlemacker v. Comm. of Pa.*, 281 F. Supp. 175 (E.D. Pa. 1968), aff'd. 413 F.2d 84

[4] Petitioners also alleged the deprivation of constitutional rights under the First, Sixth, Ninth & Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§1985 & 1988.

(3d Cir. 1969), cert. den. 396 U.S. 1046 (1970); *Brown v. State of Pa. by Bd. of Parole,* 311 F. Supp. 1176 (E.D. Pa. 1970).

In providing for an award of attorney's fees in certain civils rights actions by its adoption of the Attorney's Fees Act, Congress did not broaden the substantive causes of action in which such an award could be made. Consequently, the Commonwealth of Pennsylvania remains immune under the Eleventh Amendment from an award of attorney's fees against it, notwithstanding the legislative history accompanying the Attorney's Fees Act to the contrary.

The Report of the House of Representatives Committee on the Judiciary, H.R. Rep. No. 94-1588, 94th Congress, 2nd Session, September 15, 1976 (to accompany H.R. 15460), at 7, concluded that governmental officials, who frequently are defendants in civil rights actions:

> ". . . have substantial resources available to them through funds in the common treasury, including taxes paid by the plaintiff themselves. . . The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities."

Without any extended analysis, the Judiciary Committee simply relied upon this Court's decision in *Fitzpatrick v. Bitzer,* —— U.S. ——, 96 S.Ct. 2666 (1976), in concluding: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state government."

House Report, at 7, n. 14. It is submitted that the Judiciary Committee misinterpreted the impact of this Court's decision upon Congress' power to abrogate the Eleventh Amendment.

In *Fitzpatrick,* this Court authorized the award of back pay in the form of past retirement benefits as money damages in a suit brought against the State of Connecticut pursuant to Title VII of the Civil Rights Act of 1964. However, Title VII had been expressly amended to subject governments, government agencies and political subdivisions to suit for violations of Title VII. The Court distinguished its prior decision in *Edelman v. Jordan, supra,* in which a retroactive award of damages had been denied because 42 U.S.C. §1983 does not contain any Congressional authorization to join a state as defendant. The existence of such authorization under Title VII, exercised pursuant to Congress' authority under section 5 of the Fourteenth Amendment, was held by the Court to overcome the Eleventh Amendment defense asserted by the state in *Fitzpatrick:*

> "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contests." —— U.S. ——, 96 S.Ct. at 2671.

Conversely, while Congress *could have* subjected the states to awards of damages and attorney's fees in actions brought under 42 U.S.C. §1983, it did not do so, given the language of the Attorney's Fees Act. Rather, Congress merely rendered those "persons" already subject to

suit under the Civil Rights Act provisions specified therein as subject to an award of attorney's fees as well.

The Report of the Senate Judiciary Committee, No. 94-1011, June 29, 1976 (to accompany §2228) exhibits a similar misconception as to the constitutional scope of the Attorney's Fees Act. As did the House Report, the Senate Report concluded that attorney's fees "will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." Senate Report at 5. Since the Senate Report was issued prior to this Court's decision in *Fitzpatrick v. Bitzer, supra,* the Senate Judiciary Committee couched its rationale in terms apparently adopted from *Edelman v. Jordan, supra,* justifying the fee awards as "ancillary and incident to securing compliance with these laws" and "an integral part of the remedies necessary to obtain such compliance." Senate Report, at 5.

The Senate Judiciary Committee misinterpreted the language in *Edelman* which recognized that the expenditure of money from the state treasury by state officials in order to comply with the mandate of a judicial injunctive decree constitutes a permissible "ancillary effect on the state treasury." 415 U.S. at 668 The context of the "ancillary effect" language in the *Edelman* opinion establishes that the focus of the Court was limited to the expenditure of state funds necessary in complying with whatever injunctive relief was afforded. Referring to its prior decisions, the effects of which were to increase future welfare benefits paid from state treasuries, the Court explained:

> "But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. *Such an ancillary effect on the State treasury is a permissible and often inevitable consequence of the principle announced in Ex Parte Young, supra.*" 415 U.S. at 668. (Emphasis supplied.)

Thus, the term "ancillary effect" applies only to that expense necessary for a State to comply prospectively with a court's order, but does not encompass all expenses, costs and fees of a prevailing litigant.

The rule recognized by this Court in *Edelman*, which respondents submit remains unchanged, is that when private parties seek under 42 U.S.C. §1983 to impose a liability which must be paid from public funds in the state treasury, the Eleventh Amendment is a bar to such suit. Citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), this Court concluded that, absent waiver by the state, the actual source of the funds to be recovered is determinative of the invocation of this defense:

> "[W]hen the action is in essence one for the recovery of money from the State, the state is the real, substantive party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. Id. at 464, 65 S.Ct. at 350." 415 U.S. at 663.

Applying this analysis to the question of awarding attorney's fees under the Attorney's Fees Act, when a court enjoins a state official acting in his "official capacity" from further violating a plaintiff's constitutional right, the absence of personal liability in the official's "individual capacity" precludes an award of attorney's fees against him in that capacity. To the extent that such an award would be assessed against him in his "official capacity", that award would be "in essence one for the recovery of money from the State." 415 U.S. at 663. Only where a plaintiff could establish individual liability on the part of a state official could the official himself be subject to paying the attorney's fees. Otherwise, the policies inherent in the concept of governmental immunity would undeniably be forsaken, which clearly was not the intent of Congress. *See, Pierson v. Ray*, 386 U.S. 547 (1967); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975).

What ever its intent, Congress has not, by the express language of the Attorney's Fees Act, subjected the states to liability for attorney's fees, which was readily conceded by one court which has applied the new Act. *Wade v. Mississippi Cooperative Extension Service*, 45 U.S.L.W. 2301, 2302 (N.D. Miss., December 14, 1976).[5] This Court observed in *Edelman v. Jordan, supra* at 676-77:

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[5] The Attorney's Fees Act was also held to apply to a case before the Eighth Circuit Court of Appeals. *Finney v. Hutto*, No. 76-1406 (8th Cir., January 6, 1977). The court in that case, as in *Wade, supra*, expressly relied upon the legislative history of the Attorney's Fees Act with which respondents have herein taken issue.

> ". . . it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself."

In the absence of explicit statutory language subjecting the states to liability for damages and attorney's fees, this Court should be reluctant to find an implicit abrogation of the States' immunity from suit under the Eleventh Amendment. *See, Employees of Department of Health & Welfare v. Missouri,* 411 U.S. 279 (1973).

Accordingly, petitioners' request for attorney's fees cannot be granted since Congress has failed to define the term "person" to include states or state agencies in the civil rights provisions relevant to this case, thereby continuing their Eleventh Amendment immunity from monetary liability.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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